

## CLASS ACTION SETTLEMENTS THAT ARE PROPERLY FOCUSED ON CONSUMERS

FEDERAL TRADE COMMISSION WORKSHOP  
PANEL: THE USE OF “COUPON” COMPENSATION AND OTHER NON-PECUNIARY REDRESS  
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### Introduction

- This workshop is intended, in part, to inform certain conclusions and, if and where necessary, changes with respect to coupon settlements or resolution of class litigation through other non-pecuniary relief.
- Let me open by noting that everyone – the Courts, the public, Congress and government agencies, plaintiffs and class members and their counsel, defendants and their counsel – all have the same focus for class actions and their settlements:
  - ▶ Litigation of appropriate claims in class actions and resolutions of those cases to (a) provide compensation to victims, and also (b) avoid/deter repetition by defendants of the illegal acts
  - ▶ Appropriate representation of classes by counsel and representatives
  - ▶ Valuable settlements obtained in class actions
  - ▶ Pro rata sharing of settlements by all class members
  - ▶ Appropriate fees to counsel in the cases, and appropriate awards (if any) to class representatives
  - ▶ In point of fact, although parties can disagree on the definition of “appropriate” and “valuable,” I do not believe there is much controversy on these points – everyone, including (actually, *especially*) plaintiffs’ class action attorneys, wants these results.
- I also believe that it is not a purpose of this workshop to eliminate class actions; thus, the benefits of Rule 23 should be recognized, and any discussion on or changes to settlements must recognize the checks and balances already made part of Rule 23 and class action processes. In addition, the professionalism of counsel (both plaintiffs’/class counsel and defense counsel), and the fact that they will perform their responsibilities, should be acknowledged.

- ▶ Many recently suggested “reforms” ignore those checks and balances, and these facts, and seem much more directed toward the end of class actions:
  - ▶ elimination of coupon and certificate relief, and non-pecuniary compensation, in class actions,
  - ▶ required coupon payments to class counsel and other required changes to payments of fees and expenses,
  - ▶ a new, restrictive Model Rule of conduct for class action attorneys,
  - ▶ and others.
- ▶ Several of these reforms ignore the law and settlement approval processes that already are in place (including, but not limited to, notice, objections by class members represented by counsel, and the review and approval of the Court). They ignore the professionalism of and requirements on counsel, and the self-policing of class actions that already occurs. They also ignore that inappropriate settlements are not approved, or are changed to provide additional value to class members.
- ▶ These reforms also ignore two basic premises that must be part of the thinking about class action settlements and the use of non-pecuniary compensation:

*First:* the focus of a settlement should be on the consumers: what actions of the defendant(s) caused damage to the consumers, and what compensation should be provided to the Class.

*Second:* ultimately, the value of a settlement (and its components) is measured against many considerations – the status of the case, the rulings made in it, the ability of a defendant to provide compensation, the status of the law (did the law change during the pendency of the case?), the circumstances of the class members, the size of the claims, the effect of the settlement to cause prospective changes in behavior, and other facts about each case.

- Review of settlements after the fact, and without the burden of knowing (or acknowledging) all the facts of each case, negotiation and situation, will always result in criticisms based on incorrect assumptions.
- Thus, review of class action settlements should be focused on the class members, the purpose of the case and all the facts, not a presumed “need” to limit class actions or certain forms of relief.
- True reform in these cases comes from a continued focus on and consideration of the consumer.

## **Discussion**

- For this panel and discussion, there are three overall points I will emphasize. Settlements can and should:

- (1) Ensure meaningful relief for consumers,
- (2) Ensure valuable relief for consumers, and
- (3) Ensure changes in corporate behavior for the benefit of consumers.

Past and present settlements have done this, and continue to do so.

- ***Ensuring meaningful relief***

- ▶ Non-monetary relief encompasses many forms:
  - ▶ coupons or certificates to receive products,
  - ▶ coupons or certificates to receive discounts,
  - ▶ credit programs, by which class members obtain credits for alleged overcharges by calling a service line,
  - ▶ monitoring programs,
  - ▶ extended warranties,
  - ▶ research funds,
  - ▶ charitable donations made at the request of the class members,
  - ▶ and other forms of relief.
- ▶ These all can and do provide meaningful and creative relief.
- ▶ They look to how the consumers were injured – the actions of the defendants – and also look to what compensation should be reasonably provided to the consumers, based on those injuries.
- ▶ As examples only:

*Liquor Antitrust Litigation:* to compensate for alleged overcharges, coupons provided credits on bills paid by retailers every week; the coupons translated to cash each time a retailer paid his reduced bill.

*Cuisinart Litigation*: coupons provided free products, chosen by the class member and delivered for free.

*Ford TFI Module Litigation*: litigation alleged that a certain ignition module malfunctioned and caused a safety hazard (stalling); settlement provided for:

- a. reimbursement of costs already paid by class members to replace the module; reimbursement for first replacement did not require documentation,
- b. for cars on the road, an extra 50,000 mile warranty for replacement of the module with a new (fixed) piece, and
- c. a \$5 million research fund on automotive safety, paid by defendant, and disbursed by a private engineer to universities for studies and reports; neither the plaintiffs nor defendant have any control over the monies or the research performed and the publication of its results.

*Direct Merchants Credit Card Bank Litigation*: among other matters, provided choice of free products, not related to defendant's business. Those class members who chose not to receive the free products could choose to provide a charitable deduction to one of three charities.

*Compact Disc Antitrust Litigation*: provided music club members with a 75% discount on up to three discs, free shipping and bonus points.

*Bridgestone/Firestone cases*: product case, alleging defective tires; settlement provided for replacement tires and educational fund.

*Mercedes-Benz Litigation*: addressed the particular harm by providing coupons for oil changes and an extended warranty for any repairs arising out of the alleged defect.

- *Ensuring valuable relief*

- ▶ Several factors are at issue in determining the value of a non-pecuniary settlement benefit:
  - ▶ are the coupons for discounts the class members will use?
    - ▶ analysis of the class members is an issue here: businesses will use discount coupons readily and easily (every time they pay a bill or purchase a product from the defendant); this also will be true for individual customers, depending on the circumstances (music club members) or the product (class members will buy groceries).
    - ▶ analysis of the products is also an issue: will the class members buy the product? Is the price of the product to be discounted sufficiently low that there is a reasonable assurance that class members will buy it? Are there statistics that show the class members will buy a higher-priced product (for example, statistics show certain truck owners will buy another truck)?
  - ▶ do the coupons provide products that the class members want?
  - ▶ are coupons usable with other discounts, or will these other discounts make the coupons less useful and hence less valuable?
  - ▶ is there any time-limit on the benefit, and if so, is it reasonable?
  - ▶ is it easy to receive the benefit?
    - ▶ check-off a box on a form
    - ▶ complete a form at an internet site
    - ▶ one-page, plain-English forms
    - ▶ bring your car in for service, and you can receive the settlement benefit at the same time
- ▶ Parties and Courts also look at additional factors:
  - ▶ ensuring the benefit is not a construct for requiring the class member to provide additional business for the defendant
  - ▶ transferability

- ▶ secondary markets, which provide cash to the class members who choose not to use the coupon at its face value for its defined benefit
  - ▶ but: when are these available? may depend on the value of the discount/product and the discount/product itself
- ▶ testimony of experts on expected redemption statistics
- ▶ reports to Courts on numbers of claimants, results
- ▶ minimum guaranteed payments to class members
- ▶ remainder goes to benefit or charity.
- ▶ Other issues also should be considered when valuing non-monetary settlement benefits:
  - ▶ the value of the free product to the class member is the potential cost to the class member in the market, not the cost to the defendant (which may pay less because it manufactures the product or buys it at a volume discount)
  - ▶ the financial circumstances of the defendant may be such that monetary payments are not available, but use of non-cash benefits may provide a settlement
    - ▶ corollary: a defendant may be able to provide more value in non-monetary benefits than in a cash settlement
  - ▶ the defendant's costs of notice and distribution of the benefits or administration of the settlement are substantial
- ▶ When class members are provided a choice as to how they will participate in the settlement. – are given several options on their benefits – they are showing they value the part that they select: it's valuable to them.
- ▶ All of these questions/issues/points for negotiation, and many other facts of each case and the circumstances of each settlement, affect and ultimately determine the value of the non-monetary benefits.

- ***Ensuring changes in corporate behavior for the benefit of consumers***

- ▶ A settlement can – and should seek to – cause changes in corporate behavior. These may be direct or indirect, but nonetheless have a tangible impact on consumers.
- ▶ Prevention is always better than redemption. Thus, settlements should seek prevention of actions similar to those alleged in the litigation, not only by the defendant institution but by others as well.
- ▶ First consider *Internal High-Level Corporate Changes and Actions*
  - ▶ Securities class action settlements have been quite successful in obtaining changes in the corporate governance processes followed by defendants:
    - ▶ Requiring appointment of Corporate Governance Officers and Panels
    - ▶ Changing managerial positions and CEO responsibilities
    - ▶ Causing election of independent Boards of Directors
    - ▶ Appointments of independent panels and committees
    - ▶ Systems for voluntary reports on issues of concern
    - ▶ Standards and Codes of Ethics
  - ▶ I believe that consumer class actions can make the same achievements, although in different areas, by *changes to insure similar injury does not occur again*.
  - ▶ Insure good business practices in the settling company, to confirm it has processes in place to avoid the same problems.
  - ▶ Thus, as part of settlements, put panels and processes in place to deal with issues involved in the class action:
    - ▶ Education committees and panels
    - ▶ Provisions allowing for input from line-workers
    - ▶ New standards under which issues and information must be brought to, and considered by, executive and managerial committees
    - ▶ Think outside the box on methods to effectuate change at the highest levels in a corporation, at the decision-making level.

- ▶ In addition, a method for bringing value in class action settlements is to *Effectuate Change in the Day-to-Day Operations* that are directly on-point to the issues in the litigation. Some examples:
  - *Direct Merchants Credit Card Bank Litigation*: in a class action on credit card practices and sales, defendant agreed to reimbursements of overcharges and incorrect fees that had been charged to class members and provision of free products or (at the class members' choice) a contribution to a charity, and made the following changes in operations and day-to-day activities for a certain period of time after the settlement was approved:
    - a. Changes in the disclosures made in the monthly statement to each cardholder who was in an overlimit status, stating that payment of the minimum payment set forth on the billing statement might not avoid the cardholder being charged an overlimit fee.
    - b. Changes in payment posting times and allowance of "grace periods".
    - c. Changes in the termination requirements for certain protection plans offered by the defendant.
    - d. Additional recording and verifications of all outbound telemarketing sales of products and services to confirm the validity of each sale.
    - e. Confirmation of the practice that offered a potential cardholder the ability to obtain a credit card alone without additional products or services, and elimination of the direct mail marketing method where any box on a form requesting a product had been pre-checked for the consumer.
    - f. Elimination of the designation of a re-purchase as "automatic," where the product was not free.
    - g. Extensive additions to the information given to a customer in outbound telemarketing solicitations on products.
    - h. Additional disclosures of participation requirements in direct mail solicitations and during telemarketing solicitations, and through use of websites and direct mail packages.



- i. Changes in the terms and conditions of certain products, including those determining when a customer could collect under certain plans.
  - j. The addition of price information to the first paragraph of the terms and conditions of certain products.
  - k. Provision of additional information on the face of convenience and promotional checks and on statements applicable to them.
  - l. Additional information on the defendant's website concerning certain card and product issues that were involved in the lawsuit.
- *Carbon Dioxide Antitrust Litigation*: defendant provided a settlement fund and changed contract terms at issue in the litigation.
- *In re Dun & Bradstreet Credit Services Customer Litigation*: defendant provided a settlement fund and agreed to implement measures to avoid future fraudulent sales of credit information.
- *American Express Co. Litigation*: the class action alleged overcharges in an automatic flight insurance plan; the settlement gave insurance premium refunds and set in place new procedures for future insurance orders.
- Thus, the parties use management of the defendant, experts and the information gained from discovery to structure these processes and changes in day-to-day operations.
- The Result of all of these? *Valuable Non-Monetary Benefits In Class Action Settlements* because of the focus on the consumer and the availability of a panoply of different, complimentary benefits and methods for compensation.

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